92-1652

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MR. ERWIN ERNST AND MATCHMAKER REAL ESTATE SALES CENTER, INCORPORATED,

Petitioners,

v.

LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, GLENN BREWER, KAREN HASKINS-BREWER, VICTOR CROWN, MELVIN DILLARD, QUEEN FRAZIER, SANDI GAFFEN, WILLIAM McCARTHY, AND SHARON SWAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

John L. Gubbins
1662 CTH Q
Montfort, WI 53569
(608) 943-8488

Counsel for Petitioners

QUESTIONS PRESENTED

A. Whether by relieving testers of the necessity of proving at trial injury in fact and standing, the Seventh Circuit has abrogated this Court's reasoning in the *Warth*, *Village of Bellwood*, and the *Haven's* opinions.

B. Whether contrary to the decision of this Court in *General Building Contractors Association*, the Seventh Circuit has applied the doctrine of *respondeat superior* as one of strict liability to real estate brokers for the conduct of their independent sales agents.

LIST OF PARTIES

The petitioners are Mr. Erwin Ernst and Matchmaker Real Estate Sales Center, Incorporated (hereinafter "Matchmaker"), an Illinois corporation. Mr. Ernst owned and managed until recently petitioner Matchmaker, a real estate business in the Marquette Park neighborhood of the City of Chicago. The respondents are Leadership Council For Metropolitan Open Communities, a not-for-profit Illinois corporation and its testers Glenn Brewer, Karen Haskins-Brewer, Victor Crown, Melvin Dillard, Queen Frazier, Sandi Gaffen, William McCarthy, and Sharon Swan.

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Petition For A Writ Of Certiorari

The petitioners, Erwin Ernst and Matchmaker, respectfully request that a writ of certiorari issue to review the order of the Seventh Circuit Court of Appeals issued in the above entitled proceedings.

OPINIONS BELOW

The opinion and order of the Court of Appeals are published at —F.2d—(7th Cir. 1992) and are printed in the appendix hereto.

JURISDICTION

The order of the Seventh Circuit Court of Appeals partially affirming the judgments against Erwin Ernst and Matchmaker were entered on December 10, 1992. The Court of Appeals denied petitioners' Petition For Rehearing With Suggestions For Rehearing En Banc on January 11, 1993. The jurisdiction of this Court is revoked under 28 U.S.C. Section 1254.

STATEMENT OF THE CASE

Petitioners Erwin Ernst and Matchmaker have defended against a single claim of violating the Civil Rights Act of 1866, 42 U.S.C. § 1982 and the 1968 Fair Housing Act, 42 U.S.C. §§ 3604 (a), (b), and (d). Pursuant to 28 U.S.C. § 636 (c), the parties consented to trial before a Magistrate judge. After a bench trial, the Magistrate judge found both Mr. Ernst and Matchmaker liable for damages. She also found four salespersons liable, but they have not petitioned here. Based on the doctrine of *respondeat superior* and Mr. Ernst's conduct after the filing of the complaint, she awarded plaintiffs compensatory damages, punitive damages, and attorneys fees.

The Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. The Seventh Circuit reversed all punitive damage awards against Mr. Ernst and Matchmaker. It also reduced the amount of compensatory damages awarded to plaintiff Leadership Council. The Court, however, affirmed the remainder of the compensatory damages awarded against petitioners based on the doctrine of *respondeat superior*. None of Mr. Ernst's conduct, nor any actions of Matchmaker violated Section 1982 or Section 3604. Both petitioners were held liable for damages because of the conduct of Matchmaker's four salespersons.

A. Factual Background

Petitioners Ernst and Matchmaker with four real estate salespersons Daniel King (hereinafter "King"), Sara Munoz ("hereinafter "Munoz"), Carol Scarpiniti (hereinafter "Scarpiniti") and Alan Walker (hereinafter "Walker") were engaged in selling residential real estate in the Gage Park and Chicago Lawn neighborhoods on the southwest side of the City of Chicago. During 1987 and 1988, operations of Matchmaker and the practices of its salespersons were tested by Leadership Council for Metropolitan Open Communities (hereinafter "Leadership Council") and its testers Glenn Brewer (hereinafter "Brewer"), Karen Haskins-Brewer (hereinafter "Haskins-Brewer"), Victor Crown (hereinafter "Crown"), Sandi Gaffen (hereinafter "Gaffen"), William McCarthy (hereinafter "McCarthy"), and Sharon Swan (hereinafter "Swan") for racial steering. Leadership Council is a not-for-profit corporation whose purpose is to promote open housing in the Chicago metropolitan area. The individual testers were employed by Leadership Council to pose as potential home buyers and then to submit a written report of their observations.

The events underlying plaintiffs one count complaint arose from five "tests" conducted by Leadership Council on the Matchmaker offices between July 22, 1987 and June 23, 1988. For each test, Leadership Council had a white couple contact the Matchmaker offices by telephone or by visit. The visit of the white couple was followed shortly by a visit by a

black couple. Both sets of couples sought residential real estate.

A unique factual aspect of this steering case is the changing demography of Gage Park and Chicago Lawn, Matchmaker's market area. The key fact evidenced by Chicago municipal statistics is that Gage Park and Chicago Lawn are not undergoing resegregation. This fact is uncontroverted. As the Magistrate found, 'Racial steering tends to cause a community to "resegregate"...' (Op. 11/7/90, p. 26) The Magistrate, however, could find no evidence and indeed made no finding that the Gage Park and Chicago Lawn neighborhoods were undergoing resegregation. (Op. 4/5/91, p. 8) Indeed and most significantly, the Magistrate did not even refer to a threat of resegregation for these neighborhoods at any point in her two lengthy opinions. She could not find a threat of resegregation because in fact whites are moving into Gage Park at a rate eleven times greater that of blacks and into Chicago Lawn at a rate almost twice that of blacks. Not only is there no white flight, there is in fact the opposite occurring. Whites are buying into Gage Park and Chicago Lawn in great numbers.

Matchmaker's own uncontested sales summaries reflect the same trend. In 1987, of a total of 110 Matchmaker sales, 50 were made in the Gage Park neighborhood. In 1988, of a total of 89 Matchmaker sales, 36 were made in the Gage Park area. In 1987, 21 Matchmaker sales were made in Chicago Lawn. In 1988, 15 Matchmaker sales were made in Chicago Lawn. Thus in 1987, 63.5% of all Matchmaker sales were made in the Gage Park and Chicago Lawn areas.

Of all property sold in 1987 and 1988 by Matchmaker in Chicago Lawn, over 80% was sold east of Kedzie. Kedzie is a street selected by the Magistrate to divide the neighborhoods. Virtually all these sales were to white buyers. For those same years, Matchmaker sold four homes to black buyers in Matchmaker's sales market. Thus Matchmaker's own sales statistics dovetail with the demographic statistics of Dr. Bousifield, an acknowledged expert in Chicago demographic statistics. Matchmaker's business followed market demand in its principal market area. It was not steering whites out of its

market area. Without question it was selling residences to whites in Gage Park and Chicago Lawn in overwhelming percentages.

In all Leadership Council conducted five "tests" of Matchmaker and its salespersons.

Test One

The white testers were Mr. Govas and Ms. Castillo. King was the Matchmaker salesperson who met with them. (For purposes of testing and demographics the Magistrate found and counted Hispanics as whites.) On or about July 22, 1987, Castillo telephoned Matchmaker and spoke with King, informing him that they were interested in buying a house of the southwest side in the $70,000 price range. King set an appointment to interview them for July 25, 1987. Mr. Govas was then employed by the Leadership Council to help locate rental housing for Section VIII clients. The Leadership Council has placed black clients in rental units in the Gage Park and Chicago Lawn area. On or about July 25, 1987, Govas and Castillo met with King at the Matchmaker offices at 5427 South Kedzie Avenue in Chicago. During the interview the testers refused to specify area or style of house. King ran a Multiple Listing Service (hereinafter "MLS") general list of all available residences in the Gage Park, Chicago Lawn, West Lawn, West Elston, and Garfield Ridge. This list contained hundreds of residences and was given to the testers. From this general list testers selected five or six residences for which King provided them specific listings. King suggested and the testers agreed to drive by the five or six listings to view them from the outside.

The MLS listings are computer lists of available real estate. The listing contains all available real estate entered by participating brokers. The MLS lists are general and specific. General listings identify type and location of property with some coded information on features. The specific listings or detailed printouts contain all significant itemized information on each location.

King struck two addresses from the MLS listings that he provided testers Govas and Castillo. These were the properties located at 4400 South LeClaire in Garfield Ridge and the 5210 South Princeton in Fuller Park. The address at 4400 South LeClaire is an empty lot and is listed as unimproved real estate. The Princeton property is an apartment building located on the south side of the city and was not in tester Govas; mind on the southwest side. King struck the addresses because they were not single family residences located in the area specified by the testers. Govas agreed that the testers were not interested in purchasing an empty lot or an apartment building.

During the interview the subject of the great number of lower priced houses east toward Western Avenue and the smaller number of homes at higher prices came up. King told the testers that Gage Park had great supply and lower demand while in West Lawn and Garfield Ridge demand outruns supply. King also said that if the testers saw a house in West Lawn, West Elston, or Garfield Ridge, they should move quickly because those houses generally sold fast. In fact there are more single family residences in Gage Park and Chicago Lawn than in West Lawn, West Elston, and Garfield Ridge, but the homes in Gage Park and Chicago Lawn tend to be older, smaller, on smaller lots, and lower in price. All these statements are true.

Tester Govas could not give all the addresses of the five or six houses for which King provided detailed listings. King tried to set up appointments for two houses, but was unable to set a time convenient to the testers' schedule. The white testers saw no houses.

The black testers Deborah and Maurice Bennett were hired by Leadership Council for Test One. Mrs. Bennett called Matchmaker and spoke to King on July 23, 1987. She informed King that she was seeking to buy a house in the $70,000 range. She at first indicated that she was looking in the southwest side of Chicago. After questioning by King of her familiarity with the "area", tester Bennett stated that she was familiar with the "area" and in fact she had a bank

account at Talman. Talman is located at 55th and Kedzie, one block from the Matchmaker offices. At some point during the telephone conversation, Bennett also indicated she knew and liked the bungalow style house. King then set up an appointment with the Bennetts to interview them on July 25, 1987.

The testers met with King at the Matchmaker offices on July 25, 1987. King confirmed at several points during his subsequent interview with them that the testers knew and wanted to live in the "area". When King provided the testers with a general MLS listing of residences in the Gage Park neighborhood, he asked, "you want to live in this area, right?" The addresses were distributed throughout Gage Park both east and west of Kedzie Avenue.

After reviewing the general computer printout of approximately forty to fifty addresses of all available housing in Gage Park, the testers inquired about the prices of the many residences listed that ran below the testers' suggested price range. King replied that the residences were listed at the lower prices because they fell within the average price for the "area". King also volunteered to run a list of just higher priced houses, but that these would be outside the "area". The testers declined this list. King provided them with the general list so they could drive by some of the addresses.

The testers also indicated that they wanted to buy a bungalow style home, preferably brick with a bay window. Very rarely do bungalow style homes in Gage Park approach the $70,000 price range suggested by the testers. In fact, most fall near $50,000 in price.

At some point during the interview, King showed the testers a picture of a bungalow located in Gage Park east of Kedzie Avenue. King showed the photograph to the testers only to confirm that they knew and liked bungalow style homes as built in Gage Park. Defendant King then lived at 5032 South Washtenaw, which is located approximately two blocks west of Western Avenue in Gage Park. Gage Park is a predominantly white neighborhood. King offered to show the

Bennetts houses in the Gage Park "area" that afternoon, but the testers declined. Both of the Bennetts admitted that they did not believe King encouraged or discouraged them from viewing or choosing to consider any community or house. King treated the Bennetts cordially throughout.

Test Two

The white testers Rita and Joseph Ernst hired for the second test were inexperienced testers. The test that they performed at Matchmaker was their first. Mrs. Ernst informed defendant Walker initially by telephone that she and her husband were looking for a single family residence on the southwest side, south of Roosevelt Road. Also concerning location she informed Walker that they wanted a residence near an expressway that would be convenient for frequent trips to Peoria and for her husband to drive by automobile to the Loop. The Stevenson Expressway (I-55) travels southwest toward Peoria and has an entrance and exits at Kedzie Avenue, and one mile east and west and Damen and Pulaski, respectively. The Ernsts also informed Walker that they were looking for a home in the $65,000 to $75,000 range. Mrs. Ernst spoke with Walker on or about August 12, 1987. The Ernsts informed Walker that they lived in Hazel Crest. Hazel Crest is not convenient for public transportation to the Chicago Loop and is less convenient than Chicago Lawn for automotive transportation to the Chicago Loop as well as to Peoria. In response to their needs for transportation and their first choice of Hazel Crest on moving to Chicago from the state of Georgia, Walker responded "you didn't know the area."

On the next day, August 13, 1987, Walker telephoned the Ernsts to discuss with them detailed information concerning listings in their price range. Walker provided Rita Ernst with specific details on five listings. The five listings were located in Chicago within several blocks of Kedzie Avenue. Four of the five listings are located in Chicago Lawn. Chicago Lawn is predominantly white. Three of the addresses suggested by Walker are south of 71st Street and are west of Western Avenue. Mrs. Ernst wanted to see all five of the residences.

Walker and the Ernsts together viewed four of the five homes. At one home, 3515 West 72nd Street, Rita Ernst inquired of Walker concerning the absence of "For Sale" signs. Walker responded, so people "would not drive around and ask to look at the houses." Mr. Ernst believed that Walker meant that the signs were prohibited so that homeowners would not be bothered by unqualified buyers who "drive around and ask to look at the house." Mrs. Ernst recalled that Walker referred to "nice neighborhoods" when he made his remark concerning the absence of for sale signs due to the prohibition of the Chicago sign ordinance.

Both Rita and Joseph Ernst did not believe in their August, 1987 test that they had been discouraged from viewing available homes in any neighborhood. Both Rita and Joseph Ernst reported that Walker made no express references to race. Both Rita and Joseph Ernst were uncertain if Walker used code words. The "code" words they are unsure of, i.e., "nice" and "certain people". The Magistrate found these to be code words for race.

Subsequently in March, 1988, the Ernsts and Walker viewed two other homes, one of which was located in Gage Park. Gage Park is a predominantly white neighborhood. The residence listed in Gage Park for showing by Walker to the Ernsts were located north of 55th Street.

The black testers in the second test were Linda Hale and James Hill; they also met with King. On August 14, 1987 tester Hale first telephoned Matchmaker and spoke with King. Over the telephone, Hale stated that she was interested in houses in the $70,000 to $75,000 price range. She also firmly directed King to look in the area west of Western Avenue bounded on the north by 55th Street and on the south by 71st Street. Hale never provided a western boundary. King understood that Hale wanted a residence located within one mile or so west of Western Avenue. The area Hale specified fell directly in the Gage Park and Chicago Lawn neighborhoods. Hale's speech contains no accent that would identify her as a member of the black race. King met with Hale

and Hill on August 16, 1987. He presented them with a new "house" listing at 8221 South California, but the testers indicated they did not want to go south of 71st Street. The 8221 South California listing was priced at $62,900 and was located in Ashburne, a white neighborhood.

King then ran a general MLS listing for the Gage Park and Chicago Lawn areas. The list contained all available housing for sale in those neighborhoods and was provided to the testers. From the general list, testers Hale and Hill selected three addresses for viewing. These were:

(1)	5918 South Fairfield	($57,900)
(2)	5830 South Washtenaw	($57,999)
(3)	7217 South Washtenaw	($62,900)

The MLS listings for Chicago Lawn contain necessarily addresses south to 74th Street because it is the southern boundary of that neighborhood for the MLS sector used. The testers stated that they would consider those streets.

Hale had indicated to King that she worked in Hyde Park, but that her husband, tester Hill, flew out of Midway frequently. Both locations are accessible from 55th Street (Garfield Boulevard). Gage Park and Chicago Lawn are about equidistant between the two at the area near Western Avenue.

On July 25, 1987 while the testers were in the Matchmaker office, King set up appointments for the residences located at 5918 South Fairfield and 5830 South Washtenaw. These houses were located approximately one mile from King's own residence. King accompanied the testers to view both houses.

At trial Hale testified that at the time the testers entered the Matchmaker offices, King provided three detailed printouts of houses east of Western Avenue and south of 71st Street. This information, however, is stated neither in her report nor in her complaint. Further, Hale stated in her written report that King had no printouts at the point where the testers first

entered the office. In fact Hale relates that King first said "that he had never met us and he did not know what we would be interested in or he would have already set up some appointments." King himself denies ever providing Hale with detailed listings of houses east of Western Avenue.

Hale and her co-tester Hill both report that King neither encouraged nor discouraged them from considering any house or community.

Test Three

The white testers hired for Test Three were Elvia Fernandez and Manolo Castillo. On October 29, 1987 tester Fernandez telephoned the Matchmaker offices concerning a house advertised in the *Southwest New Herald*. The advertised house was located at 3730 West 61st Street in West Lawn. Fernandez spoke with Walker. Walker described the 3730 West 61st Street house and then provided her with a new listing located at 3359 West 64th Street in Chicago Lawn. The residence listed at 3359 West 64th Street was a very recent Matchmaker "house" listing and had not been advertised nor entered into the MLS. A "house" listing is a listing that the brokerage firm has under exclusive contract with the selling owner.

Fernandez and Castillo informed Walker that they sought a house in the $60,000 to $70,000 range. Walker instructed Fernandez to drive by the two addresses. Fernandez wanted to set appointments for showing on Friday. Walker suggested Saturday and he set an appointment for the testers to come to the office on Saturday, October 31, 1987.

On October 31, 1987 Walker met the testers at the Matchmaker offices. After the testers appeared at the Matchmaker offices, Walker telephoned only the owner of the residence at 3350 West 66th Street in Chicago Lawn to schedule an appointment. An appointment was set and the testers with Walker viewed the residence at 3359 West 64th Street. They viewed no other locations. Walker provided the testers with a general computer printout with 41 listings available single

family residences in Chicago Lawn in their price range. Walker also provided the testers with a profile sheet to explain the codes. Approximately eight homes fell in their price range and three are located east of Kedzie Avenue. Walker instructed the testers to drive by the additional listings if they were dissatisfied with the house at 3359 West 64th Street. Chicago Lawn is a predominantly white neighborhood with some blacks moving in, but not in a pattern of resegregation.

The black testers hired for Test Three were Theresa Prim and Gregory Lawrence. Munoz who interviewed and assisted them was the receptionist and a part-time salesperson with Matchmaker. She passed her State of Illinois Real Estate salesperson licensing examination in the summer of 1987. Shortly after passing, she began working with Matchmaker customers on a part-time basis. When any conflict developed between her duties as receptionist and those of salesperson, Munoz was directed to put her duties as receptionist first.

On October 31, 1987, tester Prim called Matchmaker and spoke with Munoz. Prim inquired concerning two Matchmaker-advertised "house" listings at 5330 South Avers and 3730 West 61st Street. Munoz provided her with detailed information concerning each residence. During the conversation Prim told Munoz that she was interested in purchasing a house at the price of $60,000. Munoz voluntarily provided the details of two additional listings for 3359 West 64th Street in Chicago Lawn and 5649 South Albany in Gage Park. The two listings were Matchmaker "house" listings between $50,000 and $60,000. The listing at 3359 West 64th Street was unadvertised and was not entered on the MLS. It is located west of Kedzie Avenue.

Prim suggested, and Munoz agreed, to contact the owners of the four house listing and try to set up appointments for Sunday, the following day. (P.X. 163a) Munoz attempted to contact the owners and set up appointments for Sunday. Munoz, however, was unsuccessful in each instance. Munoz then telephoned back to Prim to inform her that she had been unable to set up any appointments for Sunday. Munoz spoke

with Prim's husband, informing him as she testified, that she had no appointments to show. Munoz did not identify either Prim's or Lawrence's voice as having a black accent.

On Monday, Prim telephoned Munoz and Munoz again related that she had been unsuccessful at setting up appointments for the four listings. Prim then suggested that appointments be set for the next weekend and Munoz agreed. On Saturday, November 7, 1987, testers Prim and Lawrence, and defendant Munoz viewed two houses. These were the listings at 3359 West 64th Street ($59,900) and at 5649 South Albany ($51,000). Munoz herself resides at 5546 South Whipple in Gage Park, which is located one block east of the Albany house and seven blocks east of the 3359 West 64th Street house.

Munoz had not seen either of the two houses she showed to Prim and Lawrence. A new salesperson, Munoz was not aggressive. Munoz later sold both houses to actual buyers. Munoz invited both Prim and Lawrence back to the Matchmaker office to discuss further potential listings. But Prim and Lawrence refused, telling Munoz that they had another appointment. The black testers were shown the same unadvertised and unlisted house east of Kedzie as the whites were shown. The blacks were shown more houses than the white testers.

The blacks reported to Leadership Council that defendant Munoz did not discourage them from considering any community.

Test Four

Only one white tester, plaintiff Swan, reported on Matchmaker in Test Four. Co-tester Victor Crown minimally participated, arriving two hours late to the appointment with King. On June 1, 1988 tester plaintiff Swan telephoned the Matchmaker office and spoke with King. Swan told King that she wished to purchase a house in the range of $70,000 to $80,000. King believed from further contact with Swan that she was seeking a house close to $80,000. Swan further

told King that she was looking for a location on the southwest side or the suburbs.

On June 4, 1988, Swan met King at the Matchmaker office. King had set up in the interim appointments for showing two houses at 7216 South Avers in West Elston. The West Elston and West Lawn neighborhood contain homes that range in the mid-$70,000 price range. Rarely are homes $70,000 or higher listed for sale in Gage Park and Chicago Lawn.

King also provided Swan with general computer printouts for numerous areas in the City of Chicago and the southwestern suburbs. Swan denies receiving these general printouts, but this is not consistent with her other testimony because she admits that she received the profile sheet and that she was shown how to use it to decipher the MLS codes. The codes explained on the profile sheet only appear on the general computer lists.

King spent two hours discussing southwest side communities with Swan partly to pass the time waiting for Swan's cotester Victor Crown to arrive. Swan does not believe that King seriously suggested any houses, stating that he was very general. King finally canceled the two appointments for showing of the southwest side City houses. Swan was shown no homes. Swan testified that defendant King used "code" words for racial references. King testified that he used no code words for race. His statements concerning "good neighborhoods", "good resale value", and "desirable area" are all true and were said concerning the numerous communities King and Swan discussed while waiting for Crown. King's use of "you know what I mean" was an effort on his part to gain a prospective customer's attention. No other testers found King's use of the phrase "you know what I mean" a code word or phrase even though he uses it regularly.

Swan admits in her report to Leadership Council that King did not discourage her from considering any house or community. She, however, believes he encouraged several communities, although he did not disparage any communities or

houses. King's mention of Catholic Schools was solely meant to be informative.

Swan testified that while she was in the Matchmaker offices, the black tester hired for the fourth test appeared and met with defendant Munoz on the same day. According to Swan Munoz laughed after the black testers left the Matchmaker offices. Swan's testimony was inconsistent for she stated that tester Frazier and Dillard were in the Matchmaker office with defendant Sara Munoz for only five to seven minutes. Dillard reported that he and Frazier were in the office 20 minutes. Munoz testified that Frazier and Dillard were present in the Matchmaker office for 20 to 30 minutes.

Munoz, as receptionist, has the responsibility for passing out MLS lists to prospective customers. On a typical Saturday, she will hand out over a dozen or so to customers stopping by the Matchmaker office. Munoz denies that she laughed at the black testers. She considers herself a member of a minority group, i. e., Hispanic.

The black testers hired for Test Three were plaintiffs Queen Frazier and Melvin Dillard. On June 2, 1988, Frazier telephoned the Matchmaker office and spoke with Munoz. Frazier called for available listings in the $65,000 to $70,000 range on the southwest side of the City of Chicago or suburbs. Munoz asked her to be more specific. Frazier terminated the conversation and on instruction from the Leadership Council telephoned back and specified that she needed to be on a bus line. Munoz took the additional specification to mean that Frazier wanted to remain in the City where bus service is more frequent and accessible.

Munoz later provided Frazier with three Matchmaker "house" listings over the telephone and also gave her the specific features of each address. The addresses were:

(1)	6518 South California	($49,900)
(2)	6152 South Albany	($64,900)
(3)	7317 South Richmond	($69,900)

All the listings are in Chicago Lawn, a predominantly white community. Two listings fall within the price range Frazier provided. Munoz suggested and Frazier agreed to drive by the three addresses.

On June 4, 1988, Frazier and co-tester Dillard were interviewed by Munoz at Matchmaker at a desk near her receptionist's desk. Munoz and the testers discussed the three Matchmaker "house" listings. Frazier and Dillard chose to see the residence located at 6152 South Albany in Chicago Lawn. With Frazier sitting two to three feet away, Munoz called the telephone number of the owner of 6152 South Albany, but received no answer. Munoz then provided the black testers with a complete printout of all available single family residences in Chicago Lawn. Munoz also provided a profile sheet to explain the computer code. Of the 141 listings, 16 fell within the black testers price range, and of these 16, six listings were west of Kedzie Avenue and 10 were east of Kedzie Avenue.

Both Frazier and Dillard reported to Leadership Council that they did not believe that they had been either encouraged or discouraged from considering any community or house. Munoz made no comments disparaging any community or area.

Test Five

The white testers hired for the fifth test were plaintiffs William McCarthy and Sandi Gaffen. On June 13, 1988, testers McCarthy and Gaffen visited the Matchmaker office and spoke with Munoz and Scarpiniti. Testers McCarthy and Gaffen informed Matchmaker staff that they were seeking a home on the southwest side of the City or its suburbs in the $80,000 to $90,000 range.

Plaintiffs McCarthy and Gaffen refused after numerous attempts by Munoz, Scarpiniti, and other Matchmaker staff to be any more specific as to style of house or neighborhood. Munoz and Scarpiniti provided general computer listings of close to 200 homes, some falling within the testers' price

range. These addresses were located throughout the southwest side of the City of Chicago and the southwestern suburbs.

At one point plaintiff McCarthy mentioned he might be interested in a bungalow style house although he did not specify that this was the only style in which he was interested. In fact, he and his co-tester remained very general about house features except for price range.

It is extremely rare to find a bungalow in the Gage Park and Chicago Lawn areas listed above $80,000. None of the defendants ever sold a bungalow in Gage Park or Chicago Lawn for over $70,000. Defendant Scarpiniti showed the testers three houses. These were located in the Ashburne community of the City of Chicago. Two of the houses shown were ranch style and the third was Georgian. The Ashburne community has homes priced substantially higher than Gage Park and Chicago Lawn.

Defendant Scarpiniti informed the testers that to find the house they were looking for, they would need to look west of Kedzie. In fact, the homes chosen by McCarthy to view were located within a few blocks of Kedzie Avenue. Defendant Scarpiniti informed the testers that she would be doing wrong if she steered them, but then she provided them with boundaries for finding homes in their price range on the southwest side. All the information provided by Scarpiniti to the testers was accurate. At no point in her discussion with the white testers did Scarpiniti refer to race nor did she make any derogatory remarks concerning anyone who was black.

The black testers for the fifth test were plaintiffs Glenn Brewer and Karen Haskins-Brewer. On June 8, 1988, Plaintiff Brewer, a full-time employee of Leadership Council, telephoned the Matchmaker office and spoke with Sara Munoz. He informed Munoz that he was interested in purchasing a home on the southwest side, city or suburbs. Munoz in conversations tried to find out more specific geographic limitations. She inquired how far south and then east or west he wanted to look. Brewer responded that he did not

want to go south of 95th Street, but was flexible on east and west boundaries. Brewer also specified that he desired a residence in the $75,000 to $90,000 price range. After further conversations Munoz agreed to send tester Brewer a general computer listing of residences in his price range.

Munoz mailed a general computer list of all available single family residences in Brewer's price range in the area bounded by 87th Street on the north, Western Avenue on the east, 103rd Street on the south, and Cicero Avenue on the west. This geographic area includes the suburbs of Evergreen Park and Oak Lawn. Both suburbs are predominantly white. Munoz also mailed Brewer a profile sheet to explain the MLS codes. Brewer does not speak with any accent that identifies him as a member of any racial minority including black.

Brewer telephoned Munoz back approximately one week later with four addresses from the general computer listing. These addresses were as follows:

(1)	8709 South Washtenaw	($89,900)
(2)	8808 South Washtenaw	($84,900)
(3)	8833 South Utica	($78,900)
(4)	10041 South Kostner	($89,900)

Munoz agreed to try to set up showings of these four houses for the Brewers. Munoz also set an appointment with the Brewers for Monday, June 20, 1988, at 6:00 pm.

The Brewers met with Munoz at 7:00 pm on June 23, 1988. The Brewers arrived one hour late for their June 20, 1988, appointment and Munoz left the office before they arrived. In a subsequent telephone conversation, Brewer explained to Munoz that he had left work late that Monday. Munoz was able to set up one appointment of the four houses Brewer had chosen. This was the residence located at 8709 South Washtenaw in Evergreen Park. Munoz had not been able to set up appointments at the other three houses because two were already under contract for sale and no convenient date could be set for showing the last house. The two houses that

were then under contract were located at 10041 South Kostner and 8808 South Washtenaw in Oak Lawn and Evergreen Park, respectively. The brokers who listed these two houses did not want to show them because they had already executed sale contracts from purchasers. These two houses later closed on those pending contracts. The last house located at 8833 South Utica in Evergreen Park was listed with another broker who found it inconvenient to show it on the night set for the Brewer's appointment.

On June 23, 1988, Munoz met with the Brewers and showed them the house located at 8709 South Washtenaw. Munoz also set up an appointment that night for a second house located at 2701 West 86th Street in Ashburne neighborhood of the City of Chicago. It was priced at $88,000. The second house was located only one block away from the house that the Brewers chose at 8709 South Washtenaw. The Brewers preferred the Ashburne house to the one located in Evergreen Park. Munoz suggested that the Brewers call Matchmaker if they were interested in either of the houses shown. Munoz also asked if the Brewers were interested in seeing other houses. The Brewers declined and never called Matchmaker back.

The Brewers, one of whom was a full-time Leadership Council employee, did not believe that Munoz had encouraged or discouraged them in choosing either houses or communities. Munoz made no misrepresentations to the Brewers concerning the availability of the houses chosen for viewing.

Concerning the conduct of petitioner Mr. Erwin Ernst during these five tests, the trial record shows that he did nothing in violation of Sections 1982 and 3604. In fact, the record demonstrates that Mr. Ernst has worked tirelessly for many years in the Chicago area for open housing.

B. Procedural Background

After a bench trial, the Magistrate found for Leadership Council and its testers and against petitioners and the four

salespersons. She assessed damages of $102,000.00 joint and several liability against Matchmaker and Ernst; also she assessed damages of $6,500 against each salesperson. The greatest part of the damages rendered were punitive. The Leadership Council was due to receive $25,000.00 in punitive damages. A total of $19,000.00 in punitive damages was ordered *in toto* for the testers. Compensatory damages were only granted to Leadership Council in the sum of $33,000.00. Subsequently, she awarded attorneys fees in the amount of $135,718.59. Petitioners appealed both awards.

On appeal the Seventh Circuit Court of Appeals affirmed in part and reversed in part. Concerning petitioners Ernst and Matchmaker, it affirmed their joint and several liability for all compensatory damages except those struck for frustration of purpose. Also concerning the two petitioners, it struck all punitive damages.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case presents two issues on the liability of a real estate sales corporation and its broker-owner for the alleged discriminatory actions of four salespersons pursuant to Section 1982 and Section 3604. Although the broker-dealer has been found blameless, the Seventh Circuit has applied the doctrine of *respondeat superior* to find the corporation strictly liable and has then disregarded the corporate protection afforded by Illinois state law to hold the broker-dealer jointly liable for compensatory damages. The Seventh Circuit has done so in spite of the fact that the plaintiff testers at trial presented no proof of injury under Section 1982, and no proof of actual misrepresentations under Section 3604. This Court has addressed these momentous and substantial issues in previous opinions which the Seventh Circuit has ignored or misapplied.

A. BY RELIEVING TESTERS OF THE NECESSITY OF PROVING AT TRIAL INJURY IN FACT AND STANDING, THE SEVENTH CIRCUIT HAS ABROGATED THIS COURT'S REASONING IN THE *WARTH*, *VILLAGE OF BELLWOOD*, AND THE *HAVEN'S* OPINIONS.

The gist of petitioners argument is that the testers proved no injury at trial and their claims should, therefore, have been dismissed. The testers offered no proof of injury in fact and thus lacked standing. The Seventh Circuit and the Magistrate realized this hole in the evidence, but found standing nonetheless for the testers on their Section 1982 and Section 3604 claim. The Seventh Circuit addressed the standing issue raised by petitioners as one of standing to sue and not one of proof at trial. The confusion is serious and implicates Article III.

This case was foreshadowed by this Court's decisions in two earlier cases. These have been ignored or misunderstood

by the Seventh Circuit. In *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 115 fn. 31 (1978), this Court warned litigants under the Fair Housing Act that "although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial." This warning was repeated later in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 379 fn. 21 (1981).

The petitioners challenge the Seventh Circuit's decision relieving testers of the need to prove injury in fact at trial. Thus, under current Seventh Circuit law, plaintiffs suing under Section 1982 need not prove standing. The testers did not testify to any injury and showed no need to any judicial remedy. As a consequence, the Magistrate made the crucial finding that the "individual testers did not testify to any specific injury resulting from the conduct of any defendant." (Mag. Op. 11/7/90, p. 25) To later rule that Section 1982 had been violated is in direct conflict with this Court's decision in *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

The standing of the plaintiffs under the Fair Housing Act hinges on the salespersons making the sort of misrepresentations forbidden by Section 3604 (d). The Magistrate found that "each defendant made unavailable to the plaintiffs one or more dwellings based on plaintiffs' race...and misrepresented by omissions of information that houses were not available in certain areas and price ranges that were in fact available." (Op. 11/7/90, p. 30)

The Magistrate clearly erred in finding omissions of fact. The record of the trial contains no instance where defendants omitted disclosing available information. In most instances the testers received or viewed general MLS listings for Gage Park and Chicago Lawn. The Magistrate either ignored or failed to grasp the significance of these general listings. To require more of real estate salespersons than the listing of available housing in general MLS lists not only would place an impossible burden upon them, but would require indepen-

dent verification on a daily basis by each real estate office of the completeness of the MLS.

Suffice to say the Magistrate could not point to a specific omission any defendant made, either intentionally or unintentionally. Without specific instances and specific findings of misrepresentations, the testers have no standing to maintain their Section 3604 claim. Without findings of specific omissions tied to identifiable defendants, the testers claims should have been dismissed. The Seventh Circuit in its opinion failed to address petitioners' Section 1982 concerns and gave the briefest of attention to their Section 3604 issues.

The real issue of the misrepresentations by omission made by the salespersons is whether these were authorized by petitioners Ernst and Matchmaker. They were not and no Court found that they had been. The principles guiding attribution misrepresentations to the principal by the doctrine of *respondeat superior* is clarified *infra*.

B. CONTRARY TO THE DECISION OF THIS COURT IN *GENERAL BUILDING CONTRACTORS ASSOCIATION*, THE SEVENTH CIRCUIT HAS APPLIED THE DOCTRINE OF *RESPONDEAT SUPERIOR* AS ONE OF STRICT LIABILITY TO REAL ESTATE BROKERS FOR THE CONDUCT OF THEIR INDEPENDENT SALES AGENTS.

The decision of the Seventh Circuit to treat under the aegis of *respondeat superior* the relationship between the real estate broker and his salesperson as one of strict liability will cause a national upheaval in the real estate industry. Traditionally the relationship between real estate brokers and their salespersons has been that of independent contractors. The National Association of Realtors has drafted and suggests the use of an independent contractor agreement for salespersons. Matchmaker uses these form contracts with its salespersons. The impact of the Seventh Circuit's decision is to signal total disregard of federal common law principles for resolving the culpability of brokers in housing discrimination

cases. Instead, by the Seventh Circuit's reasoning the broker and his corporate business, no matter what, is strictly liable for any discriminatory misconduct of its salespersons.

The Seventh Circuit is not alone in finding brokers strictly liable for the discriminatory conduct of its salespersons. The Seventh Circuit relied heavily on the reasoning in *Walker* v. *Crigler*, 976 F.2d 900 (4th Cir. 1992) and to a lesser extent cases from the Ninth Circuit (*Phiffer* v. *Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980)) and the Sixth Circuit (*Green* v. *Century 21*, 740 F.2d 460 (6th Cir. 1984)).

In *General Building Contractors Association, Inc.* v. *Pennsylvania, et al.*, 458 U.S. 375 (1982), a Section 1981 civil rights case, this Court reversed a judgment against a trade association held liable for employment discrimination on the theory of *respondeat superior*. Among the theories dismissed by this Court is that the trade association had a "nondelegable duty" to see that discrimination did not occur. This same theory is the common thread in the reasoning of the Seventh Circuit, *Walker* and the other cases on which the Seventh Circuit relies. As this Court held in *General Building*, discriminatory intent cannot be imputed by operation of *respondeat superior*. The doctrine of *respondeat superior* could not be used with Section 1981 to make the trade associations the guarantor of plaintiff minority employees' rights against the engineers union. Similarly, with no finding that neither Erwin Ernst nor Matchmaker intentionally discriminated against Leadership Council and its testers, petitioners cannot now be held liable by operation of *respondeat superior* on the theory that petitioners' duties under Section 1982 and Section 3604 were nondelegable.

Petitioners do not seek to shift or to delegate their responsibilities under Section 1982 and Section 3604. Rather they recognize that both they and the four salespersons involved are subject to Sections 1982 and 3604. The issue comes in whether they have each exercised their respective duties or engaged in misconduct.

There is no question that petitioners Ernst and Matchmaker had a specific policy against housing discrimination. There is no question that the salespersons knew of the policy and knew which conduct it prohibited. The Magistrate, in fact, found and the record is uncontested that one of the salespersons Carol Scarpiniti had the white testers close the door to her office in Test Five so that sales manager of Matchmaker, Robert Ernst, would not hear her when she "steered" the testers into more affluent neighborhoods. (App. p. 10a) There is no way petitioners could guard against Scarpiniti's actions that she even admitted were against Matchmaker office policy. To hold petitioners strictly liable now under the theory of *respondeat superior* goes well beyond the remedial purposes of Section 1982 and Section 3604, and in fact turns petitioners into the guarantors this Court warned as excessive.

The Seventh Circuit analysis of the relationship between the real estate broker as a principal and the sales agent is confused. Without reference to the independent salesperson contract, the Magistrate and the Seventh Circuit triumphantly concluded that there was an agency relationship. The petitioners, however, do not contest that Matchmaker has an agency relationship with its salespersons. Erwin Ernst has contested any agency relationship with the salespersons. The independent contractor's agreement between Matchmaker and its salespersons outlines the boundaries of this agency arrangement. The confusion of the Seventh Circuits' analysis then is further extended to the assumption of principles governing the master-servant type of agency. See Appendix, p. 18a fn 12 . It makes this leap without any findings as to what type of agency is involved.

The relationship between Matchmaker and its salesperson is an independent contractor agency. It is not that of master-servant. The similarities are reminiscent of some factors discussed by this Court in the *General Building* opinion:

> At the core of agency is a "fiduciary relation" arising from the "consent by one person to another that the other shall act on his behalf and subject to his control." Restatement §1. Equally central to the mas-

> ter-servant relation is the master's control over or right to control the physical activities of the servant. The District Court found that the requirement of control was satisfied because "the employers retained power to oppose the union discrimination." However, the "power to oppose" the Union, even when the opposition is grounded in the terms of the collective-bargaining agreement, is not tantamount to a "right to control" the Union. Indeed, a rule equating the two would convert every contractual relationship into an agency relationship, a result clearly unsupported by the common-law doctrines on which the District Court relied.
> *Id.*, at 393-394.

Neither Matchmaker nor Ernst is the sole shareholder of the Real Estate Sales Center and its chief executive officer, have full control over the sales activities of Matchmaker's salespersons. By contract, Matchmaker as managed by Ernst has no right or authority:

(a) to assign an independent contractor any prospective listings or to direct the method of handling any such lead,

(b) to require any salesperson to accept or service any particular listing or prospective listing offered,

(c) to direct any salesperson to see or service particular parties,

(d) to restrict salesperson's activities to particular areas,

(e) to direct or control salesperson's actions except as specifically required by law and the salesperson assumes and retains discretion for methods, techniques, and procedures in soliciting property. Thus Matchmaker has little control over its salespersons.

The Seventh Circuit extends the confusion by assuming without naming the agency between Matchmaker and its salespersons as master-servant. It then resorts to the master-

servant rules set forth in the Restatements on Agency. The rules to which it refers apply solely to master-servant agency and are only generally stated without reference to the exceptions. The Seventh Circuit could have avoided the confusion by analyzing Matchmakers relationship as an independent contractor and then referring to the restatement rules for the specific tort involved. If it had done so, however, *respondeat superior* would not have governed.

The only wrong to the testers mentioned by the Seventh Circuit was the tort of misrepresentation. There was no concrete injury under Section 1982. Misrepresentation can provide standing under Section 3604 alone on this record. The misrepresentation here, however, is one of omission. The Magistrate found that everything the salespersons actually said was true. What she faulted them on was their failure to say more.

The Restatements on Agency provides a clear rule on the instance where principals can be held liable for the misrepresentations of their agents. It is stated as follows:

> Misrepresentations; in General
> A principal is subject to liability for loss caused to another by the others reliance upon a tortious representation of a servant or other agent, if the representation is:
>
> (a) authorized;
> (b) apparently authorized; or
> (c) within the power of the agent to make for the principal.
>
> *Restatement* §257.

The record will not support *respondeat superior* on any of the three grounds listed above. Again, the Carol Scarpiniti incident is helpful. To engage in any discriminatory steering, she knew that she had to keep it secret from Matchmaker supervisors. Her actions and words even warned the testers that she had stepped outside the Open Housing policies in force at Matchmaker. Thus, as is clear from her agreement,

her conduct was not authorized, did not appear authorized, and was not within her power.

The most revealing discussion in the Seventh Circuit opinion is found in the endorsement of the weighing of interests between innocent parties as outlined in *Walker*, *supra*, p. 903. It is at least straightforward.

It is hard to believe that innocent people such as petitioners Matchmaker and Ernst should be held liable for racial discrimination simply because their interests do not weigh heavy enough. Guilt under Section 1982 is not a matter of weighing interests. As this Court clearly ruled in *General Building*, only those who intentionally engage in racial discrimination are liable.

The Seventh Circuit raises the stakes beyond applying *respondeat superior* strictly. It also ruled that Matchmakers corporate veil could be disregarded finding petitioner Ernst liable simply because he owns the stock of Matchmaker corporation. Thus, Ernst, acknowledged to be an innocent shareholder, becomes liable for the actions of salespersons with whom he has no contract nor agency relationship. The Seventh Circuit did not even inquire into whether Matchmaker had observed all corporate formalities. The simple fact Ernst owned the stock of Matchmaker was enough to hold him jointly and severally liable for the misconduct of the salespersons.

There is no question that petitioner Ernst is innocent of racially discriminatory conduct. He had for years actively worked in favor of open housing in Chicago and his Gage Park neighborhood. Ernst and Matchmaker have promoted the Voluntary Affirmative Marketing Agreement sponsored by the U.S. Department of Housing and Urban Development, by the National Association of Realtors, and by the Chicago Real Estate Board. Among the efforts made by Ernst and Matchmaker on behalf of the Voluntary Affirmative Marketing Agreement is to work with other Chicago area brokers to obtain their commitment to the terms and spirit of the agreement. Also Ernst and Matchmaker have made great

efforts to organize and to initiate a joint listing service for white and black brokers in the City of Chicago. The listing service is called the Metro Listing Service. Ernst worked to organize the Metro Listing Service under the sponsorship of the Chicago Board. In 1986, Ernst was chairman of the Board Committee that initiated the Metro Listing Service; in 1987 and 1988, he was a member of the Metro Listing Service itself. The Metro Listing Service made listings in predominantly white areas known and available to black brokers and their customers. As a member of the Metro Listing Service, Ernst and Matchmaker made all their "house" listings part of the general listing of available real estate for all members of the Metro service. The majority of members of the Metro Listing Service are minorities. Mr. Maner and Mr. Williams, who testified vigorously on Mr. Ernst' behalf detailing his work for open housing in Chicago, are the first two black presidents of the Chicago Board of Realtors and had worked with Mr. Ernst for open housing.

Finally, the basic fallacy in the Seventh Circuit's analysis is that its rationale, erroneous as it is, has no place even in this case. In *Walker*, the weighing of interests between the innocent victim and the innocent landlord involved real injuries. The Fourth Circuit provided a deep pocket to compensate real losses. In the instant case, as the Magistrate found and the Seventh Circuit recognized, there were no injuries. Without injuries the interests of the testers cannot outweigh the interest of the innocent petitioners. There is no need for a deep pocket to compensate the testers and their organization.

CONCLUSION

Wherefore this Court should grant Ernst and Matchmaker's Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

Erwin Ernst, President
Matchmaker Real Estate Sales Center, Inc.

John L. Gubbins
1662 CTH Q
Montfort, WI 53569
(608) 943-8488

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 91-2491 & 91-8861

CITY OF CHICAGO, a municipal corporation, LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, a not-for-profit Illinois corporation, GLENN BREWER, KAREN HASKINS-BREWER, VICTOR CROWN, MELVIN DILLARD, QUEEN FRAZIER, SANDI GAFFEN, WILLIAM MCCARTHY, and SHARON SWAN,

Plaintiffs-Appellees,

MATCHMAKER REAL ESTATE SALES CENTER, INCORPORATED, an Illinois corporation, DANIEL KING, SARA MUNOZ, CAROL SCARPINITI, ALAN M. WALKER, and ERWIN ERNST,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 88 C 9695—Joan Humphrey Lefkow, *Magistrate Judge*

ARGUED SEPTEMBER 15, 1992—DECIDED DECEMBER 10, 1992

Before Bauer, *Chief Judge*, Flaum, *Circuit Judge*, and Wood, Jr., *Senior Circuit Judge*.

Nos. 91-2491 & 91-3861

BAUER, *Chief Judge.* Plaintiffs, consisting of the City of Chicago (the "City"), the Leadership Council for Metropolitan Open Communities (the "Leadership Council"), and individual "testers," sued Matchmaker Real Estate Sales Center, Inc. ("Matchmaker"), its sole shareholder Erwin Ernst, and its sales agents, Daniel King, Sara Munoz, Carol Scarpiniti, and Alan Walker. Plaintiffs sought recovery for violations of the Civil Rights Act of 1866, 42 U.S.C. § 1982 ("Section 1982"),[1] and the 1968 Fair Housing Act, 42 U.S.C. §§ 3604 (a), (b), and (d) ("Section 3604").[2] Pursuant to 28 U.S.C. § 636(c), the parties consented to trial before a magistrate judge. After a bench trial, the magistrate judge found the defendants liable. She awarded the plaintiffs compensatory damages, punitive damages, and attorneys' fees. For the reasons set forth below, we affirm in part and reverse in part.

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[1] Section 1982 states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[2] Section 3604 states, in pertinent part:

> [I]t shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status or national origin.
>
> * * *
>
> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

Nos. 91-2491 & 91-3861

I. FACTS

In 1987, the Leadership Council suspected that the defendants were engaging in the illegal practice of racial steering.[3] The Leadership Council therefore conducted a series of tests of defendants' activities. Pairs of black and white "testers"—individuals who posed as homeseekers—went to Matchmaker and inquired about buying homes on the southwest side of Chicago or nearby suburbs.[4] The Leadership Council closely matched the black and white teams for financial qualifications (including income and possible down payments) and housing needs (such as family size and preferences). Beginning in July of 1987, the Leadership Council, through its testers, began the first of five tests.

A. *Test One*

In July of 1987, Rosalinda Castillo, a white tester, called Matchmaker and spoke to defendant Daniel King. She requested information about houses for sale priced in the $70,000 range. King ascertained Castillo's family size and available downpayment ($10,000). Tr. at 245-46. On July 25, 1987, Castillo met King at the Matchmaker office.

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[3] Racial steering is

> a 'practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups.'

Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 n.1 (1982) (quoting plaintiffs' complaint).

[4] Certain areas of southwest Chicago had a black population of less than ten percent. Other areas, which we categorize as racially mixed, had a black population between 10 and 50 percent. Finally, other areas had black populations in excess of 50 percent. We will identify these areas as necessary throughout our discussion of the facts.

They discussed financing and possible mortgage lenders. Castillo and her white co-tester, Kenneth Govas, told King their combined income was $39,000. King suggested that they look in the West Lawn and Garfield Ridge areas. Tr. at 247. Both are white neighborhoods. King had a Multiple Listing Service ("MLS") list of many homes with prices up to $75,000 which provided addresses, neighborhoods, and other general information.

King crossed out two houses on the list. Both houses were in areas that had virtually a 100% black population. King advised the testers that if they saw a house in West Lawn, West Elsdon, or Garfield Ridge (all white areas), they should move quickly because those houses generally sell fast, unlike the homes in the Gage Park and Chicago Lawn areas along Western Avenue (which were either racially mixed or black areas). King also gave the white testers a detailed computer printout list of six houses in the West Lawn and West Elsdon areas.

Also in July of 1987, Deborah Bennett, a black tester, called Matchmaker's office and spoke with King. Tr. at 343. Bennett requested information about houses for sale in the $70,000 price range. Bennett informed King that her family income was $51,000 and that their available down payment was $12,000. Tr. at 344. On July 25, 1987, Bennett and her black co-tester, Maurice Bennett, met with King. King told them they should have no problem obtaining financing, but he made no specific suggestions about obtaining financing as he did with the white testers. King showed the black testers a picture of a house available for $39,900 in a racially mixed area. Tr. at 346. King did this despite the black testers' specific request for houses in the $70,000 price range. King also gave the black testers a listing of about 40 houses in Gage Park and Chicago Lawn (both racially mixed or black areas). The houses on the list ranged in price from $45,900 to $52,000, well below the requested $70,000 price range. Tr. at 571.

B. *Test Two*

In August of 1987, Rita Ernst, a white tester, called Matchmaker and spoke to Alan Walker. She requested information about houses for sale priced in the $65,000 to $70,000 range, with easy access to and from Peoria. Ms. Ernst informed Walker that she and her family had moved from Georgia and had rented a house in Hazelcrest, a Chicago suburb. Tr. at 225. Ernst stated that her family's income was $42,000 and that their available down payment was $9,000. Tr. at 224. On August 13, 1987, Walker called Rita Ernst and told her about five houses he had selected. All of the houses were located in white areas west of Kedzie Avenue.[5] On August 15, 1987, Walker met Rita Ernst and her white co-tester, Joseph Ernst, to inspect the houses he had selected. After Rita Ernst asked Walker about the absence of "For Sale" signs in front of the houses, he responded that "these were nice neighborhoods and that they want to keep the neighborhoods nice." Tr. at 229. He also said that the signs were missing in order to discourage "certain parties [who] want to come in." Tr. at 1009.

In March of 1988, the Ernsts met Walker again and viewed two additional homes he had selected. Tr. at 371-72. Both houses were in their price range and located in white areas west of Kedzie. Also, Walker told the white testers that he had a third house in Gage Park that was "nice" but that he would not show it to them because it was "east of Kedzie" (in a black area) and they "wouldn't want to live there." Tr. at 376-78.

Also in August of 1987, Lynda Hale, a black tester, called Matchmaker and spoke to King. Hale requested information about homes in the $70,000 to $75,000 range in southern Gage Park and Chicago Lawn between 55th and 71st Streets west of Western Avenue. She also told

[5] All parties apparently treated Kedzie Avenue as a racial dividing line. West of Kedzie was considered a white area, while east of Kedzie was considered a black area.

King that she preferred a home near Midway Airport because her husband travelled from there often. Tr. at 387-88. When Ms. Hale and her black co-tester, James Hill, arrived for their appointment on August 16, 1987, King had already selected four homes south of 71st Street, three of which were east of Western Avenue. All of the homes were in racially mixed areas and priced well below the black testers' requested price ranges. When the black testers renewed their request to see homes which were located north of 71st Street and west of Western, King did not shift his focus to the west. Instead, he selected two homes located near Western Avenue, priced between $57,000 and $57,999, more than $12,000 below the low end of the testers' price range and located in racially mixed areas. Tr. at 391. At the time the black testers visited Matchmaker, homes were available in the requested $70,000 to $75,000 price range, as the white testers in Test One had been given listings for West Lawn and West Elsdon (both white areas) in that price range less than two weeks earlier. Also, the West Lawn and West Elsdon areas are significantly closer to Midway Airport.

C. *Test Three*

In late October of 1987, Elvia Fernandez, a white tester, telephoned Matchmaker's office and asked about a house located in West Lawn (a white area) that had been advertised for sale. She spoke to Alan Walker and told him she was married with one child and had a household income of $40,000. Tr. at 300-01. He provided her with information about the advertised house and also suggested that Fernandez drive by another house in the area that was not yet advertised. On October 31, 1987, Fernandez and her white co-tester, Manolo Castillo, met with Walker and told him that they wanted to inspect the unadvertised house. Walker asked the white testers about their preference in housing, their price range ($60,000 to $70,000), and down payment. Tr. at 301. Walker also set up an appointment for the white testers to inspect the house. He

showed the white testers the house and advised them to call him as soon as they made a decision.

On the same day the white testers called, Theresa Prim, a black tester, telephoned Matchmaker and requested information about homes advertised in the same advertisement the white testers had called about. Prim spoke with Matchmaker agent Sara Munoz. Tr. at 990. The first house Prim asked about was in West Elsdon (a white area). The second house was in West Lawn (also a white area). Munoz told Prim that the price of the first home was $82,500, and the price of the second house was $75,000. Prim informed Munoz that her price range was $60,000, but also said she wanted to see both houses. Munoz told Prim that Prim should make an offer and see if the owners would negotiate. When Prim asked if Matchmaker had any other listings, Munoz suggested two homes priced at $51,000 and $59,900. The homes were located in Gage Park and Chicago Lawn (both black areas). Munoz never asked about Prim's income or possible down payment. Tr. at 991.

Later, Munoz called Prim and informed black tester Gregory Lawrence (Prim's husband) that she could not find anything else. Tr. at 476. Munoz made this statement the same day the white testers received a computer listing of 41 houses in response to their request to see houses in the same price range as the black testers. Tr. at 479-81. A few days later, Munoz told Prim that she had been unable to contact any of the owners of the four houses. Prim requested that Munoz arrange viewing appointments for the four houses during that week, preferably on Saturday, November 7. On Friday, November 6, Munoz made two appointments for the next day at the two homes in Gage Park and Chicago Lawn. Both were priced significantly lower than the homes Prim originally called about.

Munoz showed the black testers the two houses, but she made no effort to sell the houses and provided little information to the black testers. *See* Tr. at 479-81. Munoz did not request any information about their employment or financial situations, and did not offer any suggestions

as to how they could obtain financing. After showing the two houses, Munoz offered to go back to her office to see if she had any more listings. The black testers declined to go because they felt that Munoz was not interested in dealing with them. Tr. at 481.

D. *Test Four*

In early June of 1988, Sharon Swan, a white tester, called Matchmaker and spoke to King. She requested information about houses for sale priced in the $70,000 to $80,000 range. On June 4, 1988, Swan met with King at the Matchmaker office. King asked about the employment of Swan and her white co-tester Victor Crown. Although King did not ask the white testers about their income, he advised them that they would have no trouble obtaining a mortgage. Prior to their arrival, King scheduled two appointments for the white testers to look at homes in the white areas of West Lawn and West Elsdon. The properties were priced at $86,900 and $84,900. King also provided Swan with a detailed computer listing of 19 houses ranging in price from $72,900 to $84,900 located in West Lawn, Scottsdale, and Mount Greenwood—all white areas that King described as "good neighborhoods" with houses that had "good resale value." Tr. at 200, 637-39. King made no such comments to any of the black testers with whom he dealt in Tests One and Two.

Also in early June of 1988, a day after the white testers called, Queen Frazier, a black tester, called Matchmaker's offices. The magistrate judge found that Frazier's accent, as heard at trial, as well as her name, probably identified her as a black person. Op. of Nov. 7, 1990 at 18. Frazier spoke to Munoz and requested information about houses in the $65,000 to $70,000 range. She later told Munoz that she needed to be near a bus line. Tr. at 270-71. Munoz gave Frazier a list of three houses located in Chicago Lawn, east of Kedzie, in a racially mixed area. The houses were priced at $49,000, $64,900, and $69,000. Tr. at 271-72. Munoz made an appointment for June 4, 1988 to see Fra-

zier and her black co-tester, Melvin Dillard, at the Matchmaker office. This was the same day as the white testers' appointment.

At the June 4, 1988 meeting, Munoz provided the black testers with a computer printout of 141 houses, all in Chicago Lawn. There were no houses above the black testers' price range on the printout. Sixteen of the houses listed were in the black testers' price range of $65,000 to $70,000, while 125 homes were priced below $65,000. *See* Tr. at 293-94, 739-40. White tester Swan, who was in the Matchmaker offices at the same time, received a completely different listing of houses available—all of which were in white areas.

From the original list of three houses Munoz had provided over the telephone, Frazier told Munoz that she wanted to inspect the $69,000 house. Munoz informed the black testers that the house had no garage, although they had not requested a house with a garage. Tr. at 272-73. The black testers then asked to see the $64,900 house, which was also located in Chicago Lawn, east of Kedzie. Munoz told the black testers that she had been unable to contact the homeowners. Munoz then requested the black testers' work telephone number, in case more listings became available. Tr. at 275.

E. *Test Five*

Shortly after Test 4, but still during June of 1988, William McCarthy, a white tester, called Matchmaker's office. McCarthy spoke to King about houses for sale in the $80,000 to $90,000 price range. McCarthy told King that he and his wife were from the north side of Chicago and knew nothing about the southwest side. Tr. at 159. King asked about McCarthy's finances and employment and scheduled an appointment for June 13, 1988. At the meeting, Sara Munoz initially met with the testers and produced a general computer list of approximately 200 houses in white suburban areas for McCarthy and his white co-tester, Sandi Gaffen. When it appeared that King would

not keep the appointment with the white testers, Carol Scarpiniti agreed to meet with them.

Scarpiniti asked the white testers to close the door and, after they had done this, told them that she could help them in ways that sales manager Robert Ernst could not. Scarpiniti said she knew she was "not supposed to steer," but because the white testers were from the north side, she would give them "boundaries" to tell them "where not to live." Pl.'s Ex. 17. She then told the white testers to "[m]ove as far west of Kedzie as you possibly can." Tr. at 162.

Unlike the black testers of Tests Two and Four, the white testers were not given any listings of houses in Chicago Lawn and Gage Park (both black areas). Scarpiniti claimed that she did not give any Chicago Lawn listings to the white testers because they had a much higher income ($51,000) than the vast majority of Matchmaker's customers. The white testers' income in Test Five, however, was the same as the black testers' income in Test One, yet the black testers were encouraged to see houses in Chicago Lawn and Gage Park that were $20,000 to $30,000 below their price range.

Scarpiniti also admitted that the white testers had expressed an interest in seeing bungalows and that "[t]he general population for the bungalows is in Chicago Lawn and Gage Park." Tr. at 800. Both are racially mixed or black areas. Matchmaker had numerous listings for bungalows in Gage Park and Chicago Lawn, but Scarpiniti did not show the white testers any bungalows in either area. By comparison, an agent of Matchmaker offered bungalows in Chicago Lawn and Gage Park to black tester Bennett in Test One even though these bungalows were far below her price range.[6] Scarpiniti took McCarthy's

[6] We note also a portion of a report, admitted as evidence, that McCarthy wrote while Scarpiniti talked:

(Footnote continued on following page)

telephone number and encouraged the white testers to keep in touch.

On the same day that McCarthy called Matchmaker, Glenn Brewer, a black tester, called the Matchmaker office and spoke to Sara Munoz. Brewer told Munoz that he was married, had one child, and had a household income of $60,000. He asked about houses priced in the $75,500 to $90,000 range for sale north of 95th Street and informed her that he could make a down payment of up to $15,000. Tr. at 319-20. Munoz mailed Brewer a general listing of 26 houses in the white suburbs of Evergreen Park and Oak Lawn. About a week later, Brewer called Munoz with the addresses of four houses which he and his black co-tester, Karen Haskins-Brewer, had selected from the listings and wanted to inspect. Tr. at 322. Munoz then asked about Brewer's finances, income, and possible down payment. Munoz calculated how expensive a house Brewer could afford and offered to show him a breakdown of monthly payments. Five days later, Munoz called Brewer to inform him that she had secured an appointment for only one of the four houses that Brewer had suggested. That house borders on the racially mixed Wrightwood section of Ashburn. The Brewers arrived so late for their appointment that Munoz canceled and left. Munoz subsequently reported that two of the four homes the Brewers had selected were sold. She could not get an appointment for one of the houses, but she had selected another home for them to view. That house was located in Wrightwood near the house that the Brewers had se-

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[6] *continued*

Ms. Scarpiniti mentioned that 'she knew she was breaking every law of the real estate industry but that she wants us to know where to live because we're from the northside.' She also went on to state that 'east of Kedzie gets bad and even worse toward California' but that 'she never said that.' She defended herself by saying, 'when I sell a home I want people to know exactly where they are living.'

Pl.'s Ex. 17.

lected. On June 23, 1988, the black testers viewed the two houses. Afterwards, Munoz encouraged them to continue to look for homes with her.

F. *Erwin Ernst*

Erwin Ernst is Matchmaker's sole shareholder and chief executive officer. He exercises day-to-day control over Matchmaker and its real estate agents. Tr. at 414. Ernst is a signator to the "Voluntary Affirmative Marketing Agreement" ("VAMA"), an organization sponsored by the National Association of Realtors in cooperation with the United States Department of Housing and Urban Development. VAMA commits the signators to full compliance with fair housing laws, including the avoidance of racial steering. Ernst has actively worked with other Chicago brokers to obtain their commitment to it. He has also vigorously promoted the Metro Listing Service, which integrates a variety of multiple listing services so that all listings will be available to homeseekers of every race. *See* Tr. at 845-49. Ernst and Matchmaker are members of the Metro Listing Service.

Ernst has established a number of written office policies and procedures for Matchmaker. *See* Tr. at 884-86. One of those policies is the requirement that all Matchmaker agents abide by VAMA and all fair housing laws.[7] All of the individual defendants testified that they were aware of this policy. In pursuit of this policy, Ernst required

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[7] Another of Matchmaker's policies prohibits racial steering. According to Erwin Ernst's testimony at trial, this policy states:

> All sales agents should be aware of the tendency to steer unintentionally when prospects do not specifically tell the sales agent where they want to view homes, the location is open. If in these instances non-minority prospects are only shown non-integrated areas and minorities are not shown non-integrated areas, it could be concluded that steering is occurring.

Tr. at 940.

all of his agents to attend fair housing training courses sponsored by local real estate boards.[8]

The magistrate judge found that Ernst was unaware at or near the time the events occurred of any of the tests performed by the Leadership Council. The magistrate judge also found that he was unaware of any pattern of conduct that those tests suggest. Op. of Nov. 7, 1990 at 25.

G. *Decision by the Magistrate Judge*

After a bench trial, the magistrate judge ruled in favor of the plaintiffs and awarded them compensatory damages, punitive damages, and attorneys' fees. The magistrate judge found that agents King, Scarpiniti, Munoz, and Walker violated the Civil Rights Act of 1866 (Section 1982) and the Fair Housing Act (Sections 3604(a), (b), and (d)). The magistrate judge also held Matchmaker and Ernst vicariously liable for the discriminatory actions of the agents. The magistrate judge found that all plaintiffs—the Leadership Council, the plaintiff testers, and the City—suffered injuries as a result of defendants' actions.

Specifically, the magistrate judge ordered the defendants to pay each individual tester $1,000 in punitive damages for a total of $8,000. Of this amount, King, Munoz, Scarpiniti, and Walker were liable for $1,500 each, and Ernst and Matchmaker were liable for the remaining amount. The magistrate judge ordered the defendants to pay the Leadership Council a total of $16,500 as compensatory damages. The magistrate judge also awarded the Leadership Council $16,500 for frustration of its purpose and another $25,000 in punitive damages. King, Munoz, Scarpiniti, and Walker were each liable for $2,500 of the

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[8] Agent Daniel King, for example, testified that the office policy was to "[t]reat everybody the same." Tr. at 531. King also testified that he attended two fair housing seminars, one run by the Southwest Suburban Board of Realtors and the other by the Chicago Real Estate Board. Tr. at 532.

punitive damages. The magistrate judge ordered Matchmaker and Ernst to pay the remaining amount. Finally, the City received $25,000 in punitive damages of which King, Munoz, Scarpiniti, and Walker were each liable for $2,500. Again, the magistrate judge ordered Matchmaker and Ernst to pay the remaining amount. J. Order of June 6, 1991, *modified*, June 18, 1991, at 5-6. Pursuant to the Fair Housing Act, 42 U.S.C. § 3613(c)(2), the magistrate judge held all defendants jointly and severally liable for plaintiffs' attorneys' fees and expenses. Mem. Decision of Nov. 18, 1991 at 11.[9]

II. ANALYSIS

A. *Standing*

Defendants argue on appeal that none of the plaintiffs were injured and therefore do not have standing. Appellants' Brief at 34-38; Appellants' Reply Brief at 15-18. We disagree and conclude that all the plaintiffs—the City, the Leadership Council, and the testers—have standing to sue.

Article III of the United States Constitution requires that federal courts decide only cases or controversies. U.S. Const. art. III, § 2, cl. 1. In order to satisfy this requirement, a party must show that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

The City in this case has standing. William Granderson, director of fair housing for the City, testified that racial steering leads to resegregation, the process by which a neighborhood which is predominantly white rapidly becomes populated by racial or ethnic minorities. Tr.

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[9] The magistrate judge awarded the Leadership Council and the individual plaintiff testers fees and expenses in the amount of $135,718.59. The magistrate judge also awarded the City costs and fees of $25,565.25 and issued injunctive relief against defendants.

at 428. People who have lived in the neighborhoods become panicked and lose interest in the community. Tr. at 431. This causes a destabilization of the community and a corresponding increased burden on the City in the form of increased crime and an erosion of the tax base. Tr. at 428. Further, the City's fair housing agency has to use its scarce resources to ensure compliance with the fair housing laws (including its own fair housing ordinances). The City's fair housing agency cannot perform its routine services—human relations training, community workshops, etc.—because it has to commit resources against those engaged in racial steering. Tr. at 432.

These injuries parallel those alluded to in *Gladstone*, also a racial steering case. There, the Supreme Court noted the adverse effects of racial steering on a city or town. 441 U.S. at 110-11. Such harms, the Court observed, include the reduction in the number of buyers in a particular community, with a corresponding decrease in property values. *Id.* at 110. "A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." *Id.* at 110-11. Noting the importance to a community of promoting stable, integrated housing, the Court indicated that if a party's sales practices begin to rob a city or town "of its racial balance and stability, the [city or town] has standing to challenge the legality of that conduct." 441 U.S. at 111.

The injuries suffered by the City in this case are precisely those described in *Gladstone*. The City has shown that it has been injured by the defendants' illegal racial steering. The City, like the Village of Bellwood, Illinois in *Gladstone*, has standing.

The Leadership Council also has standing. "[T]he only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination." *Village of Bellwood v. Dwivedi*, 895 F.2d

1521, 1526 (7th Cir. 1990). *See also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *South-Suburban Housing Center v. Board of Realtors*, 935 F.2d 868, 878-80 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 971 (1992). This standard is clearly satisfied in this case. The Leadership Council is a fair-housing agency. By conducting the investigation into Matchmaker's activities, the Leadership Council deflected its time and money from counseling to legal efforts directed against discrimination. The Leadership Council therefore has standing to sue.

Defendants' challenge to the testers' standing is equally without merit. We note that by enacting the Fair Housing Act, Congress "conferred on all 'persons' a legal right to truthful information about available housing." *Havens Realty*, 455 U.S. at 373. "A tester who has been the object of a misrepresentation made unlawful under § 804(d) [Section 3604(d)] has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions." *Id.* at 373. "[A] tester to whom a real estate agent makes a misrepresentation forbidden by 3604(d) has standing to complain about the misrepresentation, because the statute creates a right to be free from such misrepresentations." *Dwivedi*, 895 F.2d at 1526. Here, the testers were treated in a "racially discriminatory fashion, even though they sustained no harm beyond the discrimination itself." *Id.* at 1527. We conclude that the testers have standing.[10]

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[10] As the Supreme Court pointed out in *Havens Realty*, Section 3604(d), unlike Section 3604(a), does not require that testers make a bona fide offer to rent or purchase. *Havens Realty*, 455 U.S. at 374.

B. *Liability and Compensatory Damages*

Defendants next challenge the magistrate judge's award of compensatory damages.[11] Specifically, they allege that the magistrate judge erred by finding all the defendants liable.

Compensatory damages are an appropriate remedy under both Sections 1982 and 3604. Given the facts of this case, the magistrate judge properly held all the defendants liable for compensatory damages. The individual agent defendants—King, Munoz, Scarpiniti, and Walker—all engaged in racial steering. The facts demonstrate that the four agents treated the black testers worse than the white testers. The magistrate judge's conclusion that this different treatment was because of race is amply supported by the record. Matchmaker agents King, Munoz, Scarpiniti, and Walker consistently steered white testers toward white areas and black testers toward black areas. The four agents also denied the black testers information about housing that they readily gave to similarly situated white testers. We agree with the magistrate judge's conclusion that the individual agents violated the testers rights under Sections 1982 and 3604. *See Dwivedi*, 895 F.2d at 1533 (holding, *inter alia*, that real estate brokers who treat customers differently from one another because of their race violate the Fair Housing Act); *Tolliver v. Amici*, 800 F.2d 149 (7th Cir. 1986) (award of compensatory and punitive damages affirmed where tester treated differently because of race).

We also agree with the magistrate judge's decision to hold Matchmaker and Ernst vicariously liable for the unlawful behavior of King, Munoz, Scarpiniti, and Walker. We first consider Matchmaker's liability for compensatory damages. Then we examine Ernst's personal liability.

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[11] Additionally, defendants raise several challenges to the factual findings of the magistrate judge. Upon our review of the record, we find that these claims are meritless and do not warrant discussion.

The doctrine of *respondeat superior* "enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant." *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392 (1982). "As a matter of well-settled agency law, a principal may be held liable for the discriminatory acts of his agent if such acts are within the scope of the agent's apparent authority, even if the principal neither authorized nor ratified the acts." *Coates v. Bechtel*, 811 F.2d 1045, 1051 (7th Cir. 1987).[12] This principle applies to suits brought under Sections 1982 and 3604. *Id. See also, e.g., Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir. 1985); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir. 1980); *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975). A principal cannot free itself of liability by delegating to an agent the duty not to discriminate. *Green v. Century 21*, 740 F.2d 460, 465 (6th Cir. 1984).

Federal courts have routinely applied these principles in fair housing cases and held principals liable for the discriminatory acts of their agents. For example, in *Walker v. Crigler*, No. 91-1542, 1992 WL 251459 (4th Cir. Oct. 5, 1992), the plaintiff brought suit under the Fair Housing Act against the owner of rental property and his agent, a professional realtor. The plaintiff, a single mother, alleged that the realtor had discriminated against her because of her sex. *Id.* at *1. A jury found the realtor liable, but ruled in favor of the owner. On appeal, the Fourth Circuit held that the evidence was sufficient "to support the con-

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[12] We note that the discriminatory acts of the four Matchmaker agents in this case were within the scope of their employment even though Matchmaker's policy prohibited such discrimination. *See Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) (employer liable for employee's actions committed within the scope of employment where employee engaged in sexual harassment that was forbidden by employer's policy). *See also Restatement (Second) of Agency* § 230 (1958) ("An act, although forbidden, or done in a forbidden manner, may be within the scope of employment.").

clusion that [the owner] specifically intended that [the realtor] *not* discriminate." *Id.* at *4 (emphasis added). Given this finding, the court noted that "[t]he central question to be decided . . . is which innocent party, the owner whose agent acted contrary to instruction, or the potential renter who felt the direct harm of the agent's discriminatory failure to offer the residence for rent, will ultimately bear the burden of the harm caused." *Id.* The court concluded that the Fair Housing Act's "overriding societal priority" requires that "the one innocent party with the power to control the acts of the agent, the owner of the property or other responsible superior, must act to compensate the injured party for the harm, and to insure that similar harm will not occur in the future." *Id.* The court therefore reversed and ordered the district court to enter a judgment of compensatory damages against the owner. *Id.* at *5.

Here, Matchmaker (through Ernst), like the owner in *Walker*, specifically instructed its agents not to discriminate. As in *Walker*, the question we must decide is who among the innocent parties—the plaintiffs or Matchmaker and Ernst—should bear the responsibility for the discriminatory acts of Matchmaker's agents. We agree with the Fourth Circuit that "we must hold those who benefit from the sale and rental of property to the public to the specific mandates of anti-discrimination law if the goal of equal housing opportunity is to be reached." *Id.* at *4.

It is not enough, as defendants' argue, that Matchmaker's sales agents were described in their employment agreement as independent contractors. The magistrate judge found, and we agree, that the relationship between Matchmaker and its four agents—King, Munoz, Scarpiniti, and Walker—was an agency relationship. *See Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135 (6th Cir.), *cert. denied*, 475 U.S. 1019 (1985).

We note that whether an agency relationship exists for purposes of the Fair Housing Act is a question to be determined by federal law. *Northside Realty Assoc., Inc.*

v. United States, 605 F.2d 1348, 1354 n.13 (5th Cir. 1979). In *Hilltop Realty*, as here, the defendant realty corporation argued that its agents were independent contractors over whom it had no control. The Sixth Circuit disagreed and pointed out that "[t]his argument has consistently been rejected in Fair Housing cases." *Id.* at 141 (citing *Green*, 740 F.2d at 465 and *Northside Realty Assoc.*, 605 F.2d at 1353-54). The Fifth Circuit reached a similar conclusion in *Northside Realty*. There, the court held that, despite an employment agreement that purportedly established an independent contractor relationship, the realty corporation retained and exercised "full authority to hire, fire, or discipline its sales people." *Id.* at 1353 n.11. The district court had found that the realty corporation directed the activities of its sales agents and that the sales agents had to sell exclusively through the realty corporation. *Id.* at 1353-54. Of the defendant's claim that the employment agreement established an independent contractor relationship, the Fifth Circuit observed that such "independent contractor" agreements are "standard in the real estate trade," and concluded that, in fact, an agency relationship existed between the realty corporation and its agents. *Id.* at 1353-54 & n.11.

Similarly, Matchmaker and its agents were parties to an employment agreement that purportedly established an independent contractor relationship. In its attempt to show that an independent contractor relationship existed, however, Matchmaker is no more successful than the defendant in *Northside Realty*. The agreement does not defeat the agency relationship enjoyed by Matchmaker and its agents. All agents were bound to act in accordance with various Matchmaker policies. Significantly, the four agents worked in Matchmaker's offices under Ernst's day-to-day control and supervision. Matchmaker is, according to Ernst's testimony, "a very small company" where there is "a lot of one-on-one training." Tr. at 886. Ernst also reported of Matchmaker and its clients that "[w]e have a very small office here. We meet people and know who they are." Tr. at 950. Additionally, VAMA—which Ernst

signed and thereby committed Matchmaker to—required Ernst to make sure that the Matchmaker office performed according to that agreement and thereby conform to the fair housing laws. Tr. at 970. Matchmaker cannot avoid liability by arguing that it had no control over the acts of its agents.[13]

Our decision in *Hamilton v. Svatik*, 779 F.2d 383 (7th Cir. 1985), further illustrates that the magistrate judge correctly held Matchmaker vicariously liable for compensatory damages. In *Hamilton*, a black woman sued defendants who, she alleged, refused to rent her an apartment in violation of Sections 1982 and 3604. *Id.* at 385. The defendants, Eleanor and Stephen Svatik, were brother and sister. Only Stephen Svatik (Eleanor's agent) discriminated against the plaintiff. Nevertheless, we held that "[a]lthough there may be no evidence of Eleanor's involvement in the incident, it is undisputed that she is the sole owner of the building and that her brother acts as her agent. In cases of racial discrimination in housing, a principal is liable for the wrongful acts of its agent." *Id.* at 388. We therefore concluded that Eleanor was vicariously liable for compensatory damages. *Id.* at 389.

Matchmaker, like Eleanor Svatik in *Hamilton*, is vicariously liable for the discriminatory acts of its agents. We affirm the magistrate judge's decision to hold Matchmaker liable for compensatory damages.

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[13] We note also that, according to defendants, "[b]y contract Matchmaker as managed by Ernst has no right or authority . . . to 'direct or control salesperson's actions *except as specifically required by law* . . . .'" Appellant's Brief at 39-40 (quoting the employment agreement between Matchmaker and its agents) (emphasis added). The law, as embodied in Sections 1982 and 3604, "specifically requires" that real estate agents not discriminate against persons because of their race. This contractual requirement demonstrates that by the very terms of the employment contract, Matchmaker retained authority to ensure that its agents conformed with the specific requirements of the law—in this case Sections 1982 and 3604.

We also affirm the magistrate judge's decision to hold Erwin Ernst personally liable for compensatory damages. We note initially that "[i]n situations such as here, where common ownership and management exists, corporate formalities must not be rigidly adhered to when inquiry is made of civil rights violations." *Clark v. Universal Builders*, 501 F.2d 324, 337 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974). In *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974), the plaintiffs, black residents of Columbus, Ohio, sued the owner of a real estate agency and three of his agents for violations of Section 1982 and the Fair Housing Act. *Id.* at 736-37. The plaintiffs argued, *inter alia*, that the owner of the real estate agency should be liable for the conduct of his employees, even though there was no evidence that the owner himself had personally joined any of the discriminatory acts. *Id.* at 737, 740. Noting the Fair Housing Act's "broad legislative plan to eliminate all traces of discrimination within the housing field," the court reasoned that "[a]s owner of the agency, [the defendant] had at least the power to control the acts of his salesmen." *Id.* at 740, 742. The court therefore held that, on remand, the defendant owner would be vicariously liable for the discriminatory acts of his agents. *Id.* at 742, 744.

Here, as in *Marr*, Erwin Ernst is the sole owner of Matchmaker. He is also Matchmaker's chief executive officer. Significantly, he supervises the day-to-day operations of Matchmaker and its agents. Under these circumstances, we apply the rule announced in *Marr* and *Clark*. *See also Sanders v. Dorris*, 873 F.2d 938, 944 (6th Cir. 1989) (owner of real estate agency cannot escape liability merely by asserting that it instructed its agents not to discriminate against blacks); *Phiffer*, 648 F.2d at 552 (owner of a motel, apartment complex, or other public housing facility is vicariously liable for discriminatory conduct of rental agent). Ernst is personally liable for compensatory damages.

The defendants also challenge the amount of the magistrate judge's award of compensatory damages. We will not reverse a judge's estimate of damages for intangible

injuries, such as the plaintiffs suffered in this case, unless her estimate is clearly erroneous. *Douglas v. Metro Rental Servs., Inc.*, 827 F.2d 252, 256 (7th Cir. 1987); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 190 (7th Cir. 1982). "[T]he damages can be no more than what is within reason under the particular circumstances." *Douglas*, 827 F.2d at 256; *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 190 (7th Cir. 1982). *See also Seaton v. Sky Realty Co.*, 491 F.2d 634, 637-38 (7th Cir. 1974) (compensatory damages may be awarded in housing discrimination case for humiliation suffered by plaintiffs). We will not reduce the amount of compensatory damages awarded by the magistrate judge unless that amount is clearly excessive. *Douglas*, 827 F.2d at 256.

The magistrate judge ordered the defendants to pay the Leadership Council $3,000 for the audits it performed in the investigation of this case. Next, the magistrate judge awarded the Leadership Council $5,000 for expected costs in the monitoring of Matchmaker's records for a period of five years and another $6,000 for continued auditing of Matchmaker's sales practices. Finally, the magistrate judge required the defendants to pay the Leadership Council $2,500 for the costs of training seminars it would perform. J. Order of June 6, 1991, *modified*, June 18, 1991, at 5-6. It was well within the magistrate judge's discretion to award these damages and the award itself is not clearly excessive.

We do agree, however, that the magistrate judge's decision to award $16,500 for frustration of purpose was error. The magistrate judge appears to have merely doubled the compensatory damage award. The magistrate judge failed to articulate any basis for this award. We have the " 'definite and firm conviction that a mistake has been committed' " in awarding damages for frustration of purpose. *Douglas*, 827 F.2d at 256 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (other citations omitted). Because the Leadership Council has provided no basis for a damage award for frustration of purpose,

we reverse, as clearly erroneous, that part of the magistrate judge's decision.

C. *Punitive Damages*

Defendants challenge the magistrate judge's decision to award punitive damages. First, they contend that the magistrate judge erroneously found King, Munoz, Scarpiniti, and Walker liable for punitive damages. Second, the defendants claim that it was error to hold Matchmaker and Ernst vicariously liable for punitive damages. We do not agree that the magistrate judge erred when she held King, Munoz, Scarpiniti, and Walker liable for punitive damages. We do agree, however, that the magistrate judge erred when she held Matchmaker and Ernst liable for punitive damages.

In fair housing cases, punitive damages are awarded to punish and deter outrageous conduct. *See Douglas*, 827 F.2d at 257. Punitive damages are appropriate when defendants act wantonly and willfully or are motivated in their actions by ill will, malice, or a desire to injure the plaintiffs. *Tolliver*, 800 F.2d at 151; *Hamilton*, 779 F.2d at 389. " '[An] award of punitive damages should be set aside only if it exceeds what is required to serve the objective of deterrence and punishment.' " *Tolliver*, 800 F.2d at 151 (quoting *Hamilton*, 779 F.2d at 389).

In applying these principles to this case, we have no difficulty in affirming the portion of the magistrate judge's decision that held King, Munoz, Scarpiniti, and Walker liable for punitive damages. Defendants argue that they should not be liable for punitive damages because they did not act maliciously towards the defendants and treated them politely. Appellants' Brief at 44. Good manners, however, do not insulate individuals from punitive damages. Although these four agents may have been courteous to the testers, their behavior demonstrates that they actively discriminated against the black testers because of their race in violation of Sections 1982 and 3604. The law does not tolerate this behavior and punitive damages are an

appropriate remedy when real estate agents engage in such blatantly obvious racial discrimination. *See Tolliver*, 800 F.2d at 151-53 (affirming an award of punitive damages in fair housing case against party that engaged in discriminatory behavior); *Hamilton*, 779 F.2d at 389 (same).

The magistrate judge also held Matchmaker and Erwin Ernst liable for punitive damages. The magistrate judge found that once the plaintiffs filed their complaint, Ernst did nothing to investigate whether his agents were behaving in a discriminatory fashion. The magistrate judge reasoned that "[a]bsent the post-complaint inactivity of Ernst, the court would not be convinced that Ernst's conduct amounted to callous indifference to plaintiffs' rights or ratification of the agents' conduct justifying an award of punitive damages." Mem. Decision and Order of April 5, 1991 at 4. The magistrate judge concluded that "[e]ven if treated only as accusations, his failure to investigate or impose additional safeguards can hardly be viewed as other than knowledgeable inaction." *Id.* Based upon these findings, the magistrate judge held Ernst liable for punitive damages.

In *Hamilton*, we considered whether a principal should be liable for punitive damages if she did not engage in the discriminatory activity. We noted that "[a] principal is liable for punitive damages for the discriminatory acts of her agent *only if* she knew of or ratified the acts." *Hamilton*, 779 F.2d at 389 (emphasis added). We reversed the punitive damages award against the principal in *Hamilton* because she was unaware of and did not ratify the discrimination. Our ruling in *Hamilton* controls our decision here. Because we find no evidence that Ernst knew of or ratified the agents' discriminatory acts, we reverse the punitive damages award against Matchmaker and Ernst.

There is nothing in the record to suggest that Ernst knew of or ratified his agents' discriminatory actions.[14]

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[14] We note that whether Ernst should have known of his agents discriminatory conduct is a question, under *Hamilton*, that we

(Footnote continued on following page)

In fact, the record reveals that Ernst affirmatively worked against discrimination in housing. Not only is Ernst a signator of VAMA, he has actively tried to get other Chicago brokers to sign it. He has also established written office policies for Matchmaker that require all Matchmaker agents to abide by VAMA and the fair housing laws. All of the individual defendants testified that they believed they would be fired if they violated Ernst's anti-discrimination policies.[15] In pursuit of his fair housing policy, Ernst required all of his agents to attend fair housing training courses sponsored by local real estate boards.

These facts hardly suggest that Ernst "knew of or ratified" his agents' discriminatory acts. Matchmaker and Ernst cannot, under *Hamilton*, be liable for punitive damages. The magistrate judge's conclusion that Ernst's post-complaint inactivity suffices for a finding of punitive damages is erroneous. *See Davis v. Mansards*, 597 F. Supp. 334, 347 (N.D. Ind. 1984) (punitive damages can be assessed against a principal under the doctrine of respondeat superior if the principal knew of or ratified the acts of its employees or agents). *Cf. Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101, 111 (3d Cir. 1981) (principal liable for punitive damages for the conduct of his agent when he was by action or knowledgeable inaction, involved in the wrongdoing or when he authorized, ratified, or fostered the acts complained of); *Fort*

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[14] *continued*
need not consider for purposes of deciding whether Matchmaker and Ernst should be liable for punitive damages. In order to justify an award of punitive damages against a principal, the standard we announced in *Hamilton*—knowledge or ratification by the principal of the agent's discriminatory act—requires a greater showing than mere negligence. *See Hamilton*, 779 F.2d at 389.

[15] For example, the magistrate judge noted of test five: "That Carol Scarpiniti found it necessary to close the door when she engaged in blatant steering may also indicate that she understood that steering was not condoned at Matchmaker." Mem. Decision and Order of April 5, 1991 at 4.

v. White, 530 F.2d 1113, 1117 (2d Cir. 1976) (punitive damages are assessed against an employer for the torts of his employee only where the former in some way authorized, ratified, or fostered the acts complained of); *Marr*, 503 F.2d at 744-45 (principal may be liable for punitive damages under Section 1982 and Fair Housing Act if by action or knowledgeable inaction the principal was involved in the wrongdoing). Because we do not believe that Ernst's post-filing inactivity shows knowledge or ratification of the discriminatory acts of Matchmaker's agents, we reverse the punitive damages award against Matchmaker and Ernst.

D. *Attorneys' Fees*

Defendants challenge the magistrate judge's award of attorneys' fees. This issue is raised for the first time on appeal. Defendants state two reasons why they did not challenge the magistrate judge's decision to award attorneys' fees. First, they contend that they did not challenge the award because defendants are not financially capable of paying the award. Appellants' Reply Brief at 23. Second, they argue that they did not raise the issue because they believed that the magistrate judge would have ignored their arguments. *Id.*

Arguments raised for the first time on appeal are ordinarily waived. *Matter of Establishment Inspection of Microcosm*, 951 F.2d 121, 126 (7th Cir. 1991), *cert. denied*, 1992 WL 89310, 61 U.S.L.W. 3256 (Sept. 29, 1992); *United States v. Blythe*, 944 F.2d 356, 359 (7th Cir. 1991). We will not consider arguments raised for the first time on appeal "except in rare cases involving jurisdiction or if justice demands flexibility." *Magicsilk Corp. of N.J. v. Vinson*, 924 F.2d 123, 125 (7th Cir. 1991).

Jurisdiction is not at issue and justice, in this case, does not demand flexibility. The defendants' reasons for not raising the issue earlier are unpersuasive. Their first reason—that they could not afford to pay the amount—could have been explained to the magistrate judge. Their

second reason alleges, without any evidence, that the magistrate judge somehow lacked the ability to decide issues fairly. "Allegations of judicial bias are very serious and should never be cast without substantiation." *Matter of Wade*, 969 F.2d 241, 243 n.1 (7th Cir. 1992). The defendants' charge impugns the integrity of the magistrate judge and we will not consider such an unsupported allegation. By challenging the attorneys' fees award for the first time on appeal, the defendants have waived the issue.

III. CONCLUSION

We affirm the magistrate judge's decision to hold King, Munoz, Scarpiniti, and Walker liable for compensatory and punitive damages. We also affirm the magistrate judge's decision holding Matchmaker and Ernst vicariously liable for compensatory damages. We reverse the portion of the magistrate judge's decision that awarded damages to the Leadership Council for frustration of purpose. We also reverse the punitive damages award against Matchmaker and Erwin Ernst. The defendants' challenge to the attorneys' fee award was waived and is denied.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—12-10-92

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, a municipal corporation, LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, a not-for-profit Illinois corporation, GLENN BREWER, KAREN HASKINS-BREWER, MELVIN DILLARD, QUEEN FRAZIER, SANDI GAFFEN, WILLIAM McCARTHY, and SHARON SWAN	)	Civil Action No. 88 C 9695
Plaintiffs,	)	
v.	)	
MATCHMAKER REAL ESTATE SALES CENTER, INC., an Illinois corporation, ERWIN ERNST, DANIEL KING, SARA MUNOZ, CAROL SCARPINITI and ALAN M. WALKER,	)	
Defendants.	)	

JUDGMENT ORDER

Pursuant to this Court's Orders of November 8, 1990 and April 15, 1991, the following judgment order is entered.

1. COMPLIANCE WITH FAIR HOUSING LAWS. The Defendants shall comply with all fair housing and civil rights laws, and they shall deal on an open and impartial basis with all buyers and prospective buyers and people seeking housing as to all premises for which they have access to listings and the ability to sell, and for which they act as agent or representative, without regard to race, color, sex, religion, or national origin.

2. INJUNCTION AGAINST STEERING. The Defendants shall permanently refrain from influencing or attempting to influence or limit the choice of homeseekers to different areas according to their race thereby acting to per-

petuate racial segregation and resegregation, a practice which is commonly known as racial steering.

3. FAIR HOUSING TRAINING. The Defendants shall in each of the next five years require all of the Defendants' brokers, associate brokers, salespeople and agents and employees who are employed by them as agents or have any contractual relationship with them and are responsible for sales of any residential properties, to attend a fair housing seminar conducted or approved by the Leadership Council within one hundred twenty (120) days of the date of the entry of this order. The location of the seminar shall be selected by the Leadership Council in consultation with a representative of Defendants. The Defendants shall pay for such seminar at the rate normally charged for such seminars. At the conclusion of each seminar, all those who have completed it shall submit to the Leadership Council a signed statement under oath, that they attended the complete program, that they understand their legal responsibilities under this order and the fair housing laws of the United States, state and local statutes, regulations and ordinances, and that they will comply with the law and this order (Exhibit A). This seminar shall be repeated once each year for a period of four (4) more years so that all new brokers, associate brokers, salespeople and agents of Defendant Matchmaker may receive training.

4. FAIR HOUSING POSTINGS. The Defendants shall in each of the next five years post at each office where they work, a notice (Exhibit B) informing all persons of their rights under the fair housing laws, including protection against racial steering, and which provides the address and telephone number of the Leadership Council so that persons may seek advice as to any suspected discriminatory treatment. Defendants will also post at each office where they work for a period of five years, the Housing and Urban Development poster identified a number 928.1 (7-75) or the HUD ("HUD") poster, if any, that is subsequently printed that contains similar language regarding equal opportunity in housing.

5. FAIR HOUSING NOTICE TO HOMESEEKERS. Defendants shall in each of the next five years provide a copy

of Exhibit B to every homeseeker with whom they have contact.

6. FAIR HOUSING ADVERTISEMENT. The Defendants shall place a copy of Exhibit B in the real estate section of the Southtown Economist within 30 days of this Order and provide Plaintiffs with confirmation of the publication. The advertisement shall appear on three consecutive Sundays and take the form of approximately two columns by ten inches in length.

7. ADVERTISEMENTS. All advertising of properties listed with defendant, in newspapers or other media or in pamphlets, brochures, handouts or writings of any kind which utilize visual images, photographs, or pictorial representations of persons shall show or depict or represent both black persons and white persons as prospective buyers and sellers and as real estate agents.

8. FAIR HOUSING LOGO. The Defendants shall in each of the next five years display the Equal Opportunity in Housing slogan and logo in all of Defendants' advertisements, telephone directories, stationery forms, pamphlets, brochures and any other written documents.

9. RECORDS ON PROSPECTIVE BUYERS. The Defendants shall in each of the next five years keep records of the names, addresses, race and sex of each prospective buyer who seeks Defendants' aid in locating housing and shall record the subsequent showings to each prospective buyer and the final disposition. Defendants shall use the Equal Service Report ("ESR") recommended by the National Association of Realtors which is attached hereto as part of Exhibit C. The Defendants shall make the ESR available to the Leadership Council or the City for inspection and copying at any reasonable time.

10. REPORTING OF COMPLAINTS. The Defendants shall, in each of the next five years, report in writing to the Leadership Council and the City of Chicago, Human Relations Commission, Fair Housing Division, any com-

plaints of racial discrimination which have been filed against Defendants within 30 days after notice of filing.

11. RETENTION OF RECORDS. The Defendants shall in each of the five years following the entry of this order, maintain and retain copies of all listings of dwellings offered for sales through the Defendants, whether privates listings or listings available through any Multiple Listing Service to which Defendants have access. The Defendants shall make said copies available to the Leadership Council or the City for inspection and copying at any reasonable time.

12. DAMAGES. Damages shall pay the Plaintiff the following amounts in damages:

a. Defendants shall pay each individual tester Plaintiff One thousand dollars ($1,000) in punitive damages for a total of Eight thousand dollars ($8,000). Defendant King, Munoz, Scarpiniti, and Walker shall each be liable for One thousand five hundred dollars ($1,500) in punitive damages; Ernst and Matchmaker are liable for the remaining amount.

b. Defendants shall pay the Leadership Council the following:

1. Three thousand dollars ($3,000) (five matched audits at $600 per audit) for the audits performed by the Leadership Council in the investigation of this case.

2. Five thousand dollars ($5,000) for the continued monitored of Matchmaker's records for a period of five years.

3. Six thousand dollars ($6,000) for continued auditing of Respondent's sales practices (two tests per year for five years).

4. Two thousand five hundred ($2,500) to the Leadership Council for one training seminar per year for five years.

5. Sixteen thousand five hundred dollars ($16,500) for the frustration of the mission of the Leadership Council .

6. Twenty-five thousand dollars ($25,000) to the Leadership Council in punitive damages. Defendant King, Munoz, Scarpiniti and Walk are each liable for Two thousand five hundred dollars ($2,500) in punitive damages. The remaining amount shall be paid by Ernst and Matchmaker.

c. Defendants shall pay to the City of Chicago the following:

1. Twenty-five thousand dollars ($25,000) to the City of Chicago in punitive damages. Defendant King, Munoz, Scarpiniti and Walker are each liable for Two thousand five hundred dollars ($2,500) in punitive damages. The remaining amount shall be paid by Ernst and Matchmaker.

d. All Defendants are jointly and severally liable for the attorney's fees and costs incurred in bringing this action.

13. COURT TO RETAIN JURISDICTION. This is a final order that disposes of all matters raised herein, but the Court shall retain jurisdiction of this case for the purpose of enforcing the provisions of this order and for entering such orders as may be necessary, including attorney's fees.

ENTER:

_____

JOAN HUMPHREY LEFKOW
United States Magistrate Judge

Dated: June 6, 1991

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 91-2491 & 91-8861

CITY OF CHICAGO, a municipal corporation, LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, a not-for-profit Illinois corporation, GLENN BREWER, KAREN HASKINS-BREWER, VICTOR CROWN, MELVIN DILLARD, QUEEN FRAZIER, SANDI GAFFEN, WILLIAM MCCARTHY, and SHARON SWAN,

Plaintiffs-Appellees,

v.

MATCHMAKER REAL ESTATE SALES CENTER, INCORPORATED, an Illinois corporation, DANIEL KING, SARA MUNOZ, CAROL SCARPINITI, ALAN M. WALKER, and ERWIN ERNST,

Defendants-Appellants.

ORDER

The Defendants-Appellants Petition For Rehearing With Suggestions For Rehearing En Banc is denied. No active sitting judge voted for rehearing.

January 11, 1993

CERTIFICATE OF SERVICE

The undersigned certifies that he has mailed copies of the above Petition for Writ of Certiorari to the parties listed below on this date April 12, 1993.

Mr. James Beyer
Seyfart, Shaw, Fairweather & Geraldson
55 East Monroe Street
Suite 4300
Chicago, IL 60603

Mr. Kelly Welsh
City of Chicago
180 North LaSalle Street
Chicago, IL 60601

_____

John Gubbins